

No. _____ 05-40881-01 2009

**IN THE
SUPREME COURT OF THE UNITED STATES**

BILLY DON SMART,
Petitioner
v
STATE OF TEXAS,
Respondent

***ON PETITION FOR WRIT OF CERTIORARI
TO THE NINTH COURT OF APPEALS, BEAUMONT, TEXAS***

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the ruling in *Crawford vs. Washington*, 541 U.S. 36, should apply to Motions to Revoke Probation.

PARTIES TO PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the Ninth District Court of Appeals of Texas.

Petitioner is Billy Don Smart. Respondent is the State of Texas.

TABLE OF CONTENTS

QUESTION PRESENTED	i
PARTIES TO PROCEEDING.....	ii
TABLE OF CONTENTS	iii. iv
TABLE OF AUTHORITIES.....	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES	3
STATEMENT OF THE CASE	4-5
SUMMARY OF ARGUMENT	6
ARGUMENT	7, 8, 9
CONCLUSION	10
APPENDICES	

APPENDIX A

Opinion in *Smart vs. State*, 153 S.W.3d 118 (Tex.App.-Beaumont Dec 22, 2004), petition for discretionary review refused [pet. ref'd] (May 25, 2005), rehearing on petition for discretionary review denied [pet. dismiss'd] (Jun 29, 2005)

TABLE OF CONTENTS CONTINUED

APPENDIX B

Official Notice from the Court of Criminal Appeals of
Texas of Denial of Motion for Rehearing

APPENDIX C

Official Notice from the Court of Criminal Appeals of
Texas of Refusal of Petition for Discretionary Review

APPENDIX D

Judgment of Conviction-Order Revoking Community
Supervision and Sentence

TABLE OF AUTHORITIES CITED

CASES:

<i>Ash vs. Reilly</i> , 354 F. Supp. 2d 11	8
<i>Crawford vs. Washington</i> , 541 U.S. 36.....	i, 6, 7
<i>Fariss vs. Tipps</i> , 463 S.W. 2d 176 (Tex. 1971)	9
<i>Morrissey vs. Brewer</i> , 408 U.S. 471, 92 S.Ct. 2593...	6, 7, 8, 9
<i>Ohio vs. Roberts</i> , 448 U.S. 56	6
<i>Smart vs. State</i> , 153 S.W.3d 118 (Tex.App.-Beaumont Dec 22, 2004), petition for discretionary review refused [pet. ref'd] (May 25, 2005), rehearing on petition for discretionary review denied [pet. dism'd] (Jun 29, 2005)	iii, 1, 8

CONSTITUTION:

U.S. Const., Amend. VI	3
U.S. Const., Amend. XIV	3

STATUTES:

28 U.S.C. § 1257(1)	3
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OPINIONS BELOW

The opinion in *Smart vs. State*, 153 S.W.3d 118 (Tex.App.-Beaumont Dec 22, 2004), petition for discretionary review refused [pet. ref'd] (May 25, 2005), rehearing on petition for discretionary review denied [pet. dism'd] (Jun 29, 2005), is attached as Appendix A. The official notice denying the motion for rehearing is attached as Appendix B. The official notice denying the petition for discretionary review is attached as Appendix C. The Judgment of Conviction (Order Revoking Community Supervision and Sentence) is attached as Appendix D.

JURISDICTION

On December 22, 2004, the Ninth District Court of Appeals of Texas affirmed the conviction (Appendix A). A timely motion for rehearing was thereafter denied on June 30, 2005 (Appendix B).

This court has jurisdiction under 28 U.S.C. § 1257(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const., Amend. VI, which provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const., Amend. XIV, § 1, which provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1254 (1), which provides:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

- (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

STATEMENT OF THE CASE

Statement of Facts and Proceedings in the Courts Below:

The Petitioner was on probation for a period of two years for Criminal Mischief. The Petitioner was sentenced on August 24, 2001 (CR p. 7-12). A Motion to Revoke Community Supervision was filed on June 6, 2003 (CR p. 27-28). An Amended Motion to Revoke Community Supervision was filed on February 9, 2004 (CR p. 49-51). The Petitioner was tried before the Honorable Judge Jerry Winfree in County Court at Law Number Two in Montgomery County, Conroe, Texas. The Amended Motion to Revoke Community Supervision was tried under Cause No. 01-162358 (RR Vol. 1, p.1). The trial began on March 11, 2004 (RR Vol. 1, p.7) and concluded on March 11, 2004 (RR Vol. 1, p.78). The Petitioner's probation was revoked and he was sentenced to 90 days confinement in the Montgomery County Jail on March 11, 2004 (CR p. 52) (Appendix D). On March 15, 2004, Petitioner timely filed his Notice of Appeal (CR p. 55). On March 15, 2004, the Trial Court certified the Petitioner's right of appeal. The opinion was handed down from the Court of Appeals, Ninth Supreme

Judicial District, Beaumont Texas. on December 22, 2004 (Appendix A). There was no motion for rehearing filed. The Petition for Discretionary Review was filed on January 20, 2005 in the Ninth District Court of Appeals and on February 11, 2005 in the Court of Criminal Appeals of Texas. The Petition for Discretionary Review was refused by the Court of Criminal Appeals of Texas on May 25, 2005 (Appendix C). A Motion for Rehearing was filed on June 10, 2005. The Motion for Rehearing was denied on June 29, 2005 (Appendix B). On July 6, 2005 the case was returned to the Ninth District Court of Appeals from the Court of Criminal Appeals of Texas. On July 6, 2005 a Motion to Stay Mandate was filed with the Ninth District Court of Appeals. On July 28, 2005 the Ninth District Court of Appeals granted the Motion to Stay Mandate. The Mandate will be issued on October 18, 2005.

SUMMARY OF ARGUMENT

Crawford vs. Washington, 541 U.S. 36, changed the landscape as it applied to criminal trials. This appeal deals only with motions to revoke probation. In Texas, and probably in other states, the prosecutor simply offers the file (presumably under *Ohio vs. Roberts*, 448 U.S. 56) and then rests its case. Defendant does not believe that this is in fact fair, under either the due process clause or the confrontation clause. Petitioner does not require that *Morrissey vs. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, be overruled, but at least expanded to allow *Crawford* to apply to motions to revoke probation.